(8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN J. SLOAN,
EDWARD T. KELLEY,
Attorneys for Petitioners.

Business Address:
1717 Dime Building,
Detroit (26), Michigan.

ECLIPSE COMPOSITION COMPANY, 243 WEST LARNED ST., DETROIT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Sixth Circuit entered December 2, 1943, denying the application

for bail pending appeal filed by the petitioners in the Circuit Court of Appeals for the Sixth Circuit on November 29, 1943.

The court below entered the order denying bail without opinion.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 [USCA Title 28, Section 347(a)].

The date of the order of the Circuit Court of Appeals is December 2, 1943.

This petition is filed January 8, 1944.

SUMMARY STATEMENT OF MATTER INVOLVED

The essential facts are contained in the petitioners' Application to the Circuit Court of Appeals for Bail, the Answer of the United States and the Reply of the petitioners thereto, all of which are in the record.

The petitioners were indicted April 23, 1943, at Detroit, Michigan, on one count of conspiracy to defraud the United States in connection with war contracts (Title 18, USCA, Section 88) and ten counts charging presentment of false claims to the United States (Title 18, USCA, Section 80). They went to trial July 15, 1943, and the jury returned a verdict of guilty on all counts on No-

vember 4, 1943, the trial having been held continuously in the interval.

The petitioners on November 24, 1943, were sentenced to imprisonment for twelve and seven years respectively and payment of fines. On the same day they filed notices of appeal to the Circuit Court of Appeals for the Sixth Circuit and the trial judge refused bail pending appeal.

At the time of refusal the trial judge stated in open court (pages 23 and 24 of Transcript—Paragraph 1 of Reply of Defendants to the Answer of the United States) that he knew that the defendants' appeal was not merely for the purpose of delay and that there were some legal questions in the case which should be appealed.

The petitioners thereupon, on November 29, 1943, filed a petition for bail pending appeal in the Circuit Court of Appeals. The petition set forth the statement of the trial judge referred to in the preceding paragraph, as demonstrating with finality that the appeal was not for the purpose of delay nor frivolous, and that there were substantial questions involved which should be determined by the Appellate Court, as stated in Rule 6 of the Rules of Criminal Procedure of May 7, 1934. The petition further contained a statement of the facts and issues in the case and the questions raised on appeal and claimed by petitioners to be substantial (Par. 7 of the Petition for Bail).

The essential facts relating to this are as follows:

The petitioners prior to the indictment were reputable and prominent engineers with an established business of several years' standing prior to the war program. As to

matters charged in the indictment, they had no contracts or dealings with the United States. Their contracts were with Ford Motor Company, Chrysler Corporation and General Motors Corporation. The Government theory is that petitioners made charges to these customers that were improper and fraudulent under their contracts, which charges the customers at some later date passed on to the Government as costs under cost-plus contracts between the customers and the Government.

One of the substantial legal questions raised on appeal is whether the petitioners can be brought within the purview of the False Claims Statute in these circumstances. The Government sought to connect petitioners with the United States by showing that petitioners had knowledge that their charges were ultimately to be reimbursed to the customers by the Government. The petitioners claim that the Government's proof on this point was inadequate as a matter of law to take the case to the jury.

Regardless of that point, the petitioners claim on their appeal that the trial judge erroneously instructed the jury on this essential question of knowledge. He charged the jury substantially that if the petitioners had the means to find out that the Government was ultimately to pay these charges, then they would be guilty of causing a false claim to be presented to the Government. We have been able to find no decision which remotely supports that proposition in a false claims case. The facts of the case at bar remove it very far from the decision in *Marcus v. Hess*, 87 L. Ed. 374.

The trial judge also erroneously instructed the jury in substance that there need be no intent to defraud the Government so far as the ten counts of the indictment

charging presentation of false claims are concerned.

The amount of fraud claimed by the Government in the indictment is about $18,000.00. The petitioners denied the challenged charges were fraudulent, but on the contrary were believed, when made, to be proper. The petitioners during the years in question did a business of over two milion dollars on the war program. As going to the question of intent to defraud, the petitioners on the trial offered to prove that by the use of time-saving devices they eliminated charges to customers, which would have otherwise been proper, of over $100,000. Except as to $20,000.00 of this amount the trial judge refused to receive this evidence. The substantial nature of this question is evident. The petitioners were charged with knowingly making fraudulent charges. They claimed they believed them proper. To show they refrained from charges amounting to many times the amount of fraud charged in the indictment, is surely competent evidence that they were not moved to make the latter charges through mere desire for gain.

The above is not a complete list of the substantial questions involved on the appeal.

The Circuit Court of Appeals, on December 2, 1943, heard oral argument on the petition in chambers, bail being opposed by the Government, and on the same day entered the order complained of, refusing bail.

QUESTIONS PRESENTED

The question presented here is: On application for bail pending appeal, where the appeal is not for the pur-

pose of delay, and there are substantial questions to be decided on appeal, should the Court refuse bail; or, if the matter of granting bail under the circumstances outlined be deemed a matter of discretion, is it an abuse of discretion to deny bail?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The following are the reasons relied on:

1. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

The right of persons to be enlarged on bail pending appeal is an important one. We refer to the question as unsettled because there seems to be no decision of this Court—indeed no clear cut decision of any federal appellate court as to the effect, if any, of Rule 6 of the Rules of Criminal Procedure on the principles laid down in *McKnight v. U. S.*, 113 Fed. 451 (CCA. 6); *Motlow v. United States*, 10 Fed. (2d) 657; and *Hudson v. Parker*, 156 U. S. 277; 39 L. Ed. 424; 15 S. Ct., 450.

Bail after conviction and pending appeal is not a matter of right. This has led some authorities to state that it is a matter of discretion but the more accurate way to put it, it would seem upon analysis of the cases, is that bail, while not generally a matter of right, will become such upon a certain condition, namely that a substantial question on appeal exists. This is the holding of *McKnight v. U. S.*, *supra*, and apart from Rule 6, the law of the

Sixth Circuit, if not of the United States under the holdings of the *Motlow* and *Hudson* cases, *supra.*

This leads to the question: What is the effect of Rule 6 upon the prior law as laid down by these decisions? Is Rule 6 merely declaratory of the principles there announced; or does Rule 6 change the previous rule of law and make the granting of bail a matter of discretion regardless of how meritorious the appeal may be? This is an important and recurring question and one to which no satisfactory answer can be found in the cases adjudicated since the effective date of Rule 6. It is respectfully submitted that this question should be settled by this Court.

2. The Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals. Assuming that bail should be granted where a substantial ground of appeal exists and that Rule 6 requires nothing to the contrary, then the order complained of here conflicts with the decision in *Motlow v. U. S. supra,* (decision by Mr. Justice Butler, sitting as Circuit Justice) as well as with the decision in *McKnight v. U. S., supra.* It is respectfully submitted that this conflict should be resolved by this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In this case it is established, we take it, by the statement of the trial judge, that the appeal is not for the purpose of delay and that substantial questions are involved on appeal; the record itself shows that substantial questions exist. We have been able to find no decision where bail was refused under such circumstances—

and while always hesitant to make so general a statement, we believe no such decisions exist. To show, as here, the existence of substantial questions, leads, in the accepted and usual course of judicial proceedings, to enlargement on bail until the doubt is resolved by the decision of the appellate court. If the convictions of the petitioners are reversed, they will have been imprisoned unjustly; and it is submitted that there is special reason to enforce the accepted and usual course of judicial proceedings where, as here, the nature of the crime of which petitioners are accused, fraud in war contracts, is especially abhorrent, the country being at war, thus inviting a disregard of or indifference to the protection normally afforded defendants by the law.

WHEREFORE, it is respectfully submitted that this petition for Writ of Certiorari to review the order of the Circuit Court of Appeals for the Second Circuit should be granted.

JOHN J. SLOAN,
EDWARD T. KELLEY,
Attorneys for Petitioners.

Dated:
January 8, 1943.

Business address:
1717 Dime Building,
Detroit (26), Mihigan

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

JOHN J. SLOAN,
EDWARD T. KELLEY,
Attorneys for Petitioners.

Business Address:
1717 Dime Building,
Detroit (26), Michigan.

ECLIPSE COMPOSITION COMPANY, 243 WEST LARNED ST., DETROIT

INDEX

Statutes Cited

Cases Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

Jurisdiction of the Court is invoked under section 240(a) of the Judicial Code as amended by the Act of

February 13, 1925, 43 Stat. 938 [USCA, Title 28, section 347(a)]. The appeal of the petitioners from the judgment of conviction in the District Court is now pending in the Circuit Court of Appeals for the Sixth Circuit. The writ of certiorari is asked to review the order of the Circuit Court of Appeals denying bail pending appeal.

The decision is in conflict with decisions of other circuit courts of appeal, and so departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. This is more fully set out in the petition for the writ under the heading "Reasons Relied on for the Allowance of the Writ of Certiorari", in conformity with Rule 38, 5(b) of the Rules of the Supreme Court.

If the writ is not granted, the petitioners will be without relief since review by this Court, if necessary and allowed, after the court below decides the appeal on the merits, will come too late. If the conviction is reversed, the petitioners will have unjustly suffered a considerable imprisonment.

CONCISE STATEMENT OF THE CASE

Such a statement is contained in the petition for a writ of certiorari filed with this brief. We fear that to repeat it here would violate the directness and conciseness enjoined on the brief writers by section 2 of Rule 38. The statement will be found in the petition under the heading "Summary Statement of Matter Involved".

ARGUMENT

The application to the Circuit Court of Appeals was pursuant to Rule 6 of the Rules of Criminal Procedure, which reads as follows:

> "The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or where the appellate court is not in session, by any judge thereof or by the circuit justice.
>
> "Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."

The first paragraph of the rule simply designates those judicial officers empowered to grant bail.

The second paragraph attaches a condition: bail shall not be granted unless the appeal involves a substantial question which should be determined by the appellate court.

The latter condition is one which had been attached for many years past by judicial decision to the right to bail after conviction. *McKnight v. United States,* 113 Fed. 451; *United States v. Motlow,* 10 Fed. (2d) 657; *Rossi v. United States,* 11 Fed. (2d) 264; *United States v. Bennett,* 36 Fed. (2d) 475; *Lewis v. United States,* 14 Fed. (2d) 111.

Rule 6, therefore, to this extent, is merely declaratory of the pre-existing rule of law. (The language of Rule

42(a)(2) in the Preliminary Draft of the revision of the Rules of Criminal Procedure makes this point even clearer than the present Rule 6. The note to this Subdivision (p. 185) states that it is a restatement of Rule 6, with two exceptions not pertinent here.) It does not purport to affect or limit the principles laid down by the decisions of the circuit courts of appeals governing the right to bail pending appeal. We should look to those decisions (and we have above referred to the leading cases on the point, the *Motlow* and *McKnight* cases being cited with particular frequency by the federal courts), for the principle determining the right of the petitioners to bail.

It is petitioners' position:

1. That there are substantial questions involved on the appeal.

2. That, therefore, petitioners are entitled to be enlarged on bail pending appeal.

As to the first point, we have already stated in the petition for certiorari that the trial judge stated on the record after refusing bail that he knew the petitioners' appeal from the judgment of conviction was not merely for the purpose of delay and that there were questions of law in the case which should be appealed. It would seem that this statement of the trial judge ought to be conclusive; however, the petitioners in their application for bail to the appellate court (paragraph 7) set forth the facts and issues of the case and pointed out several of the substantial questions involved.

This, it is submitted, is sufficient to meet the condition. As was said in the *Motlow* case, *supra*, (at page 663, 1st column, near bottom):

> "But the law does not require applicants for bail to show that they are entitled to a reversal."

The test was stated in other language in *Lewis v. United States, supra*, where the Court said that in determining whether bail should be granted, the only question to be considered was:

> "Are the errors assigned frivolous, and, is the appeal merely taken for delay? If this were a *debatable question* it would be the duty of a judge to grant bail." (Emphasis is ours.)

In view of the trial judge's statement, which is confirmed by the matters pointed out in paragraph 7 of the application for bail, surely petitioners have met this condition. Some of the questions involved on the appeal have never been adjudicated by a federal appellate court. One example is the question of criminal liability under Section 80 of Title 18, USCA (presenting false claims), where there is a complete absence of contractual relations and business dealings between the defendants and the Government.

The trial consumed some seventeen weeks. The stenographic transcript is about 8,000 pages. It is not likely that petitioners would go to the great expense of appeal in bad faith and merely for the purpose of delay.

The Circuit Court of Appeals filed no opinion and made no finding that no substantial questions were involved (Order of Circuit Court of Appeals).

Under the circumstance, the Circuit Court of Appeals, we submit, should have granted bail. We have been able to find no case, where a substantial question on appeal existed, in which bail was refused. In those cases where

bail is denied, there is the absence of substantial questions.

The proper rule has been consistently laid down in the cited cases. To illustrate this general statement we shall quote from some of them.

In the *Motlow* case, *supra*, Mr. Justice Butler said (p. 662, 2d column):

> "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail."

In *United States v. Bennett*, *supra*, the Fifth Circuit Court of Appeals said:

> "It is the settled law in the federal courts that a person who has been convicted on a criminal charge is likewise entitled to bail pending his appeal, except where it is plainly made to appear that an appeal is frivolous or taken only for delay," citing cases we have referred to and also *Hanes v. United States*, 299 Fed. 296, and *Howell v. United States*, 10 Fed. (2d) 504.

We submit, therefore, that the Court below should have granted bail, and, it having refused without any finding that the appeal was frivolous and that no substantial questions existed, this Court should exercise its power of supervision. For, we respectfully suggest, the Court be-

low departed far from the accepted and usual course of judicial proceedings. The Court below also decided the matter in conflict with the decisions of other circuit courts of appeals.

These are the reasons we ask that this Court issue the writ of certiorari.

Respectfully submitted,

John J. Sloan,
Edward T. Kelley,

Attorneys for the Petitioners.

Dated: January 8, 1944.

Business Address:
1717 Dime Building,
Detroit 26, Michigan.

INDEX

CITATIONS

573697—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK AND WILLIAM J. ZRENCHIK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals.

JURISDICTION

The order of the circuit court of appeals denying petitioners' application for bail was entered December 2, 1943 (R. 48). The petition for a writ of certiorari was filed January 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The Government, however, questions the jurisdiction of this Court to re-

view a ruling such as that of the Circuit Court of Appeals on writ of certiorari under Section 240 (a) (see *infra*, p. 10).

QUESTION PRESENTED

Whether the circuit court of appeals improperly denied petitioners' application for release on bail pending the disposition of their appeal by that court.

RULE INVOLVED

Rule VI of the Criminal Appeals Rules (18 U. S. C. following 688) provides:

> The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.
>
> Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.

STATEMENT

On November 29, 1943, petitioners applied to the Circuit Court of Appeals for the Sixth Circuit for release from custody on bail pending the disposition of their appeal by that court (R. 1–6). The allegations of that application may be summarized as follows:

Petitioners were convicted (R. 1) in the United States District Court for the Eastern District of

Michigan on an indictment (R. 2) in eleven counts charging them with causing false claims to be presented to an officer of the United States, in violation of Section 35 (A) of the Criminal Code (18 U. S. C. 80)[1] and with conspiracy to do so, in violation of Section 37 of the Criminal Code (18 U. S. C. 88). Petitioner Spalek was sentenced to imprisonment for a total of 12 years and to pay a fine of $30,000 (R. 1). Petitioner Zrenchik was sentenced to imprisonment for a total of 7 years and to pay a fine of $20,000 (R. 1). Prior to the verdict petitioners were at liberty on bond, but after their conviction, the trial court refused to release them on bail pending appeal (R. 2).

On November 24, 1943, the date of the sentences, petitioners filed a notice of appeal, and in that appeal they intend to urge several questions of law in addition to various alleged trial errors by the judge (R. 2).

The prosecution was based on petitioners' activities in the operation of the Spalek Engineering

[1] Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides in pertinent part:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof * * * any claim upon or against the Government of the United States, or any department or officer thereof, * * * knowing such claim to be false, fictitious, or fraudulent * * * shall be fined not more than $10,000 or imprisoned not more than 10 years, or both."

Company, which is engaged in the production of tool designs for the Ford Motor Company, the Chrysler Corporation and General Motors Corporation. The latter produced war materials for the Government under so-called prime contracts either of a "cost-plus-a-fixed-fee" type or of the fixed price type. Petitioners' work for the prime contractors was done on a purchase order basis. The theory of the prosecution was that under the purchase orders petitioners were entitled to charge the prime contractors for only the hours actually worked in designing for them and at the rate fixed in the purchase orders; that petitioners charged the prime manufacturers in invoices presented for time not actually devoted to work on their behalf; that the prime manufacturers presented these invoices to the Government for reimbursement because petitioners' designs were used on work on war materials produced under a cost-plus-a-fixed-fee prime contract; that petitioners knew at the time of presenting such invoices that the prime contracts were on a cost-plus-a-fixed-fee basis and that the prime contractors would present the invoices to the Government for reimbursement. (R. 2–3.)

Petitioners' defense at the trial was that the purchase orders they received from the manufacturers were not on a time and material basis; that they did not know that the designs were to be used by the manufacturers on work under cost-plus contracts; and that there was no proof

that they intended to defraud the Government (R. 3–4).

Petitioners further alleged in their application for bail that "some of the questions of law" on their pending appeal are:

1. Their acts were not within the purview of Sections 35 (A) or 37 of the Criminal Code (R. 4).

2. They had no contractual relations with the Government. Consequently, any liability on their part must arise out of their contracts with the prime manufacturers. (R. 4–5.)

3. The liability which the Government seeks to impute to petitioners could arise only out of the acts of the prime manufacturers in dealing with the Government, with which they had nothing to do and of which they had no knowledge (R. 5).

4. The Government failed to prove the causation necessary to criminal liability (R. 5).

5. Since petitioners' invoices were approved by the prime manufacturers there was no fraud between petitioners and the manufacturers. This being so, there was no fraud committed against the Government. (R. 5.)

6. The Government failed to prove that petitioners had knowledge that the prime contracts between the manufacturers and the Government were on a cost-plus-a-fixed-fee basis (R. 5).

7. "The record does not show that the whole of any one of the prime contracts is in evidence,

although the record does show that these prime contracts are frequently being amended and the nature of the amendments, even on the Government's theory of the case, and assuming that the proofs support the Government's theory, might obviate any question of fraud on the Government by changing the nature of the prime contract" (R. 5).

8. The effect of the Renegotiation Act (50 U. S. C. App., Supp. II, 1191)[2] on the purchase orders is to eliminate the specific provisions for payment stated in the purchase orders, thereby making it impossible to present a false claim in the circumstances of this case (R. 5–6).

9. Various unspecified errors in the reception and exclusion of evidence at the trial and in the charge to the jury (R. 6).[3]

---

[2] The Act of April 28, 1942, c. 247, Sec. 403, 56 Stat. 245, as amended by the Act of October 21, 1942, c. 619, 56 Stat. 982 (50 U. S. C. App., Supp. II, 1191), provides in part:

"(c) (1) Whenever in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder * * *, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor renegotiate the contract price. * * *"

[3] Petitioners also alleged that substantial sums of money were still due them from the manufacturers (R. 6), apparently on the theory that their freedom was necessary to obtain payment from the manufacturers. But the Government's answer showed that payment was being withheld pending full audit of petitioners' claims (R. 11). Consequently there is no present need for petitioners' freedom from detention.

The Government's answer to the petition (R. 7–14), to which was annexed a copy of the indictment (R. 14–44), alleged that stripped of formal language petitioners are charged with "deliberately padding their payrolls so as fraudulently to secure from their customers large sums of money for labor never performed, with full knowledge that the Government was obligated to reimburse the customers for the payments thus secured" (R. 11–12); that the appeal presented no substantial question (R. 8); that, contrary to petitioners' allegation, all of the manufacturers' contracts offered in evidence were on a cost-plus-a-fixed-fee basis (R. 8); that all of the purchase orders which petitioners received from the manufacturers were on a time-and-material basis whereby petitioners were permitted to charge the prime contractors only for direct labor actually applied to the performance of the purchase orders at a specified rate per hour for the services (R. 8–9); that all questions relating to the construction of the purchase orders were submitted to the jury in an appropriate charge by the court (R. 9); that the manufacturers' approval of petitioners' invoices was tentative, subject to audit by representatives of the Government and the manufacturers (R. 9–10); that the proof showed that petitioners knew that the manufacturers' contracts were on a cost-plus basis and that petitioners admitted this knowledge at the trial (R.

10); that the issue of petitioners' intent to defraud the Government was submitted to the jury as a fact question (R. 10); that contrary to petitioners' allegations, the court's charge to the jury was correct (R. 10); that there was no failure to offer in evidence the whole of the prime contracts (R. 10); that the Renegotiation Act does not preclude conviction under the false claims statute, for that Act is directed at recovering excess profits and does not sanction fraud on the Government on the theory that the fraud will be discovered and the Government will be made whole (R. 10–11); that the frauds by petitioners were fully shown by the evidence (R. 12).[4]

[4] The Government alleged (R. 12) that: "* * * It proved without contradiction or denial that the defendants on two occasions assigned many of their employees to the task of painting two houses belonging to the defendants. When these painters signed time slips for each of the days devoted to this painting, the defendants charged the time to Government jobs at the rates of hourly pay fixed by the purchase orders or subcontracts issued to them by the prime contractors. The result was that the Government actually paid more than eight thousand dollars for the time of men whose only labor during that time was this work of painting, and the defendants not only were repaid the amount of wages they had paid the painters but also received a profit of more than three thousand dollars besides. The evidence was also undisputed that in like manner and in numerous instances the defendants charged to Government j[illegible] the time—12 hours a day—of employees while absent on vacations or on account of illness or for other reasons, and of janitors, night watchmen, and other overhead employees. In each instance the employees signed time slips

On December 2, 1943, petitioners filed a reply to the answer of the Government (R. 45–48) in which they alleged that in the trial court, after sentence had been pronounced, the following colloquy occurred between the court and counsel (R. 45):

> [The court] * * * I don't see how an appeal in this case can be of any value except to delay it for a year and a half and we Americans are great forgivers and forgetters.
>
> Mr. Kelley: I can assure your Honor it is not merely for the purpose of delay.
>
> The Court: I know that, I know that it isn't; you have got a right to appeal; there are some legal questions that you should appeal, but I am not going to wait until this record is out.

Petitioners further alleged that although the question of whether the purchase orders were on a time and material basis was submitted to the jury, it was their position at the trial that there was not sufficient evidence to go to the jury on that question (R. 45–46); that petitioners did not know that their invoices were reimbursable by the Government, and there was no evidence that petitioners had notice that the prime contracts were on a cost-plus basis (R. 46); that the court's

---

indicating that their time was devoted to the direct labor of designing tools, dies and fixtures to be used in war production; in each instance the defendants' books of account skillfully concealed the fraud and in each instance the Government eventually paid the bills."

charge to the jury on the question of intent was erroneous (R. 46–47); and that because of the Renegotiation Statute there was no fraud in this case from the beginning (R. 47).

On December 2, 1943, after oral argument on the application (see R. 47), the Circuit Court of Appeals for the Sixth Circuit entered an order (R. 48) denying the application for bail.

ARGUMENT

Petitioners contend (Pet. 4–5; Br. 4–7) that their appeal now pending in the court below raises several substantial questions which should be decided by that court, and that the court, therefore, erred in refusing to allow their release on bail pending the disposition of the appeal.

We do not believe that Section 240 (a) of the Judicial Code, upon which petitioners rely to establish the jurisdiction of this Court, authorizes the use of the writ of certiorari for the purpose of reviewing a ruling by a circuit court of appeals denying an application for release on bail, while the merits of the appeal remain pending before that court. See the discussion of the question and the review of the pertinent authorities in Robertson and Kirkham, *Jurisdiction of the Supreme Court,* pp. 208–210. However, assuming *arguendo* that jurisdiction does exist, we submit that petitioners do not present a question warranting review by this Court.

Rule VI of the Criminal Appeals Rules makes it clear that after a conviction, and pending appeal, a defendant may not under any circumstances be released on bail unless "it appears that the appeal involves a substantial question which should be determined by the appellate court."[5] Conversely, if a substantial question is presented, the court or appropriate judge or justice may in the exercise of a sound discretion allow bail. *Sanchez* v. *United States,* 134 F. (2d) 279, 284 (C. C. A. 1), certiorari denied, *sub nom. Sanchez Tapia* v. *United States,* 319 U. S. 768.

In urging that their appeal raises substantial questions petitioners rely heavily (Br. 4–5) on an off-hand statement by the trial judge, out of context, that there are legal questions in the case

[5] In its restrictive effect Rule VI is substantially similar to proposed Criminal Appeals Rule V which was prepared in the Department of Justice upon request of the Chief Justice and transmitted to him by the Attorney General on May 26, 1933. The policy considerations underlying the proposed rule were stated as follows:

"Granting bail after conviction as a matter of course has brought the administration of the criminal laws in the Federal Courts into disrepute. This sentiment is reflected in the correspondence received from the Judges and the United States Attorneys throughout the country. The prevailing practice which permits a Judge who has not heard the evidence, and is not furnished with the record, to release defendants on bail after conviction, notwithstanding the Trial Judge has concluded that there is no merit in the appeal, creates the strongest possible incentive for groundless appeals so that defendants may enjoy their liberty so long as the proceedings may be delayed."

which should be appealed. Resort, however, to the transcript of proceedings in which the statement was made (particularly when that transcript is considered as a whole) reveals that the trial judge had an entirely different view of the case.[6] Immediately after sentencing petitioners, the trial judge, upon being advised that notices of appeal would be filed, refused petitioners' application for release on bond (Tr. 23). The judge made it clear that if a legal question were presented he might have allowed bond, but under the circumstances "I don't see how an appeal in this case can be of any value except to delay it for a year and a half and we Americans are great forgivers and forgetters (Tr. 23). * * * I have refused bail * * * chiefly from the admissions of the defendants on the stand * * *, they admit everything and then tell a cock-and-bull story that nobody, not even themselves, could hope to believe" (Tr. 24). In further reiterating his denial of bail the trial judge stated that "I don't think" the legal questions raised by petitioners "have much merit" (Tr. 28). In these circumstances it is plain that the judge's statement relied upon by petitioners was not a reflection of his considered judgment that their appeal presented substantial questions, and it is equally clear that, in denying bail, the judge was influenced by the lack of merit of the appeal and by petitioners' obvious guilt of the charges set forth in the indictment.

[6] We have lodged with the Clerk of this Court a copy of the pertinent part of the transcript.

Those "questions of law" which petitioners intend to raise in their appeal, which are capable of evaluation, are not, we submit, substantial questions calling for appellate review. Apparently petitioners' basic contentions are that since they had no direct contractual relations with the Government, their acts are not within the proscription of the false claims statute (Br. 5) and that since the Government may recover their excess profits by virtue of the Renegotiation Act they have not in fact defrauded the Government (*supra*, pp. 5–6).[7] In respect of the former it is now

[7] In their notices of appeal petitioners set out the following general grounds of appeal:

"1. Failure of the trial judge to grant defendant's motion for a directed verdict made at the close of the Government's main case and, at the close of all the proofs.

"2. That the proofs failed to show a crime cognizable under the laws of the United States: that the case should not have been submitted to the jury and the indictment should have been dismissed.

"3. Numerous errors in the admission of testimony offered by the Government, which testimony was incompetent, immaterial and irrelevant and prejudicial to the defendant, which testimony and the grounds on which its exclusion was sought will be more specifically set out in the appellant's Assignments of Error.

"4. Numerous errors in refusing to admit in evidence proffered testimony of the defendant, which testimony and the reasons why it is contended it is admissible will be more specifically set out in the appellant's Assignments of Error.

"5. Because the Court committed errors in his charge to the jury, which errors will be more specifically pointed out in the appellant's Assignments of Error.

"6. Because the Court committed error prejudicial to the defendant in certain comments made on the testimony

clear from this Court's decision in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544–545, that the false claims statute reaches "any person who knowingly assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the Government." There is a similar lack of merit in the contention that the effect of the Renegotiation Act is to eliminate the provisions for payment to petitioners contained in the purchase orders. Assuming, *arguendo,* that petitioners' premise were true, it does not follow that petitioners did not cause false claims to be filed with the Government. Every invoice showing that an employee worked on a specific government project when in fact he did other work (see footnote 4, *supra,* p. 8) plainly is a false claim and the fact that the Government may at some time by renegotiation reduce the contract

---

and in other comments made to the jury in his charge, all of which will be more specifically referred to in the appellant's Assignments of Error.

"7. Because the Court erred in refusing to give certain of the defendant's requests to charge, to which exception was duly taken, and which will be more specifically referred to in the appellant's Assignments of Error.

"8. That the conduct and comments of the Court during the course of the trial were unfair and prejudicial to the defendant and prevented his having a fair trial, which conduct and comments will be more specifically referred to in the appellant's Assignments of Error.

"9. That the sentence of the Court was excessive and unwarranted."

price which it formerly was obligated to pay for petitioners' products can not in any manner validate the false claims which petitioners previously caused to be filed with the Government.

Petitioners' other "questions of law" are, we think, incapable of evaluation on the basis of the meager record in this case. They relate to the sufficiency of proof, the receipt of evidence at the trial, and the court's charge to the jury (*supra*, pp. 5–6, 9). Certainly the mere assertion of such error does not raise a substantial question within the meaning of Rule VI, for, otherwise, alert counsel could raise every appeal, frivolous as it might be, to the dignity of one presenting a substantial question by merely claiming error at the trial, and, thus, completely emasculate Rule VI. There being nothing more in the record than the mere assertion of these errors, which the Government's Answer denies, it is impossible to determine whether there is any basis in the case for the claim of error or whether, if there was error, it was prejudicial.

In these circumstances it is plain that petitioners have not made it appear that any substantial question calling for appellate review is present in this case. This fact, considered together with the gravity of the offenses for which petitioners were convicted and the refusal of the trial judge to allow bail, makes it clear that in denying bail the circuit court of appeals did not abuse the discretion vested in it by Rule VI.

CONCLUSION

Petitioners' applications for bail were fully argued before both the trial judge and the circuit court of appeals, and in each instance the application was denied. The petition for writ of certiorari does not, we submit, show that on either occasion the respective courts abused their discretion. Consequently, we respectfully submit that the petition should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

FEBRUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944